SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 129.

RAFAEL GUTIERREZ DEL ARROYO
ET AL., APPELLANTS,

vs.

ROBERT GRAHAM.

MOTION TO DISMISS AND ARGUMENT IN SUPPORT OF SAME.

N. B. K. PETTINGILL,
Counsel for Appellee.

(22,308.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 129.

RAFAEL GUTIERREZ DEL ARROYO ET AL., APPELLANTS,

vs.

ROBERT GRAHAM.

NOTICE.

To FRANCIS H. DEXTER, Esq'r,
Counsel of Record for Appellants:

You are hereby notified that the motion to dismiss the appeal in the above cause, copy of which with other papers is hereto attached, will be submitted to the court for its action, in pursuance of rule 6, subdivision 4, of its Rules of Practice, on Monday, the 16th day of December, 1912.

Please submit any argument you may desire to make in opposition before that date.

San Juan, Porto Rico, November 25, 1912.

N. B. K. PETTINGILL,
Counsel for Appellee.

Service of the foregoing notice accepted at San Juan, Porto Rico, this 25th day of November, 1912.

FRANCIS H. DEXTER,
Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

No. 129.

Rafael Gutierrez del Arroyo et al., Appellants,

vs.

Robert Graham.

MOTION TO DISMISS.

Comes now the appellee above named, by his counsel of record, and moves the court that the appeal herein pending be dismissed, upon the following grounds, to wit:

Because the appellants have, since the entry and allowance of said appeal, submitted to and taken the benefits of the final decree entered herein by the court below in the following respects, to wit:

First, by accepting and taking from the registry of the court below, on the 2d day of September, 1912, the sum of $2,174.15, that being the balance after deducting costs of the proceeds of the price paid into said registry by the appellee under the terms of the final decree herein for the tracts of land numbered one (1) and five (5) described therein, as appears from the order of the court below entered on the 1st day of September, 1911, a

certified copy of which, together with an additional certificate from the clerk of said court below, is hereto attached as Exhibit 1.

Second, by accepting from the Graham & Granger Fruit Company, as assignee of the appellee, a conveyance of the undivided interest which he acquired from one Felicia Fernandez in that portion of the entire estate that remained in the possession of appellants Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo, as directed and provided by the terms of the penultimate paragraph of said final decree, as appears from a certified copy, translated into the English language by the official translator of the court below, of the deed conveying said interest formerly belonging to said Felicia Fernandez to said appellants, which is hereto attached as Exhibit 2.

N. B. K. PETTINGILL,
Counsel for Appellee.

The undersigned, counsel of record for the appellants in the cause aforesaid, does hereby acknowledge receipt, and accepts service of a copy of the foregoing motion with its exhibits attached and the brief or memorandum appended in support thereof, at San Juan, Porto Rico, this 25th day of November, A. D. 1912.

FRANCIS H. DEXTER,
Counsel for Appellants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Equity. No. 672.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL., Defendants.

ORDER.

It appearing to the court that the sum of two thousand seven hundred and fifty-three dollars, fifty cents ($2,753.50), has been deposited in the registry of this court by the clerk thereof as the proceeds of the sale of two parcels of land, Nos. 1 and 5, to the complainant herein, as provided in the final decree entered in this cause, under which respondents Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo were ordered to convey, transfer and cede the same to said complainant.

It is now, on this 1st day of September, 1911, ordered, adjudged and decreed that the clerk of this court pay over to the attorney of record of said respondents, Miguel Guerra, Esq., such sum of money as may remain of said amount after deducting the said clerk's commission, the notarial fees of Frank Antonsanti, Esq., and those charged

by Surveyor A. Nin y Martinez, and other costs as per memorandum filed by the clerk.

[SEAL.]

(Signed) PAUL CHARLTON, *Judge.*

O. K.

(Signed) N. B. K. PETTINGILL,
For Complainant.

O. K.

(Signed) MIGUEL GUERRA,
For Respondents.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Rafael Guillermety, clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true and correct copy of the original order in the above-entitled cause, as the same appears on file and of record in my office under date of September 1, 1911. I further certify that on September 2, 1911, I issued check No. 503 for the amount of two thousand one hundred and seventy-four dollars and fifteen cents ($2,174.15), balance of proceeds of sale to Miguel Guerra, Esq., attorney for respondents, and said check was accepted by Miguel Guerra, in compliance with the above order.

Witness my official signature and the seal of said court, at San Juan, in said district, this 19th day of November, A. D. 1912, and of the Inde-

pendence of the United States the one hundred and thirty-seventh.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY,
By L. A. GROSS, *Deputy Clerk.*

Number Sixty-one.

Purchase and Sale.

In the city of San Juan, Porto Rico, on the 15th of August, 1911, before me, Frank Antonsanti Capo, lawyer and notary public, with vicinity, residence and office in this capital, appear of one part Mr. Robert Graham, 54 years of age, farmer, married to Mrs. May Wood Graham, 44 years of age, who also appears, without profession, residents of Bayamon; and of the other part, Don Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo, of 57 and 76 years of age, respectively, farmers, residents of Bayamon.

The Graham spouses appear hereto as president and secretary-treasurer, respectively, of the corporation "The Graham & Granger Fruit Company," organized under the laws of the State of New Jersey, with headquarters in Bayamon, and duly authorized to do business in Porto Rico, the other parties hereto, Messrs. Gutierrez del Arroyo, appearing in their own right.

The contracting parties, whom I certify are personally known to me, have, in my judgment, the legal capacity necessary to execute the present deed of purchase and sale; wherefore they set forth:

First. That the said corporation is the owner of a one-fifth interest in an undivided fifth of the total value of the property named "Pueblo Viejo Arriba," in the district of Bayamon, formerly Guaynabo, ward of Pueblo Viejo, composed of from seven to eight hundred cuerdas, that is, 285 hectares, 58 ares, and 52 centiares, or 326 hectares, 38 ares, and 1 centiare; bounded on the north by Don Manuel Diaz Caneja and Messrs. Cerecedo & Company, on the east by said Cerecedo & Company, Aquilino Power, now Geronimo Landrau, Manuel Kercadó, Ulises Garcia Salgado, afterwards Rafael Ortiz; on the south by the Succession of Tulio O'Neill, Francisco Garcia y Jose J. Pesquera, and on the west by the farm "Rentas" Mauricia de los Santos, Sucesion Sagastibelza, afterwards Don Modesto Ortiz Tejada.

Second. That the said interest is still pending registration in the Registry of Property, notwithstanding that the main property called "Pueblo Viejo Arriba" appears inscribed at folio 135 of volume 19 of Bayamon, property number 1098.

Third. That the parties hereto have agreed on the sale and alienation of the said interest in the above-described property named "Pueblo Viejo Arriba," and carry the same into effect in accordance with the following

Stipulations.

First. The parties hereto, Robert Graham and his wife, Mrs. May Wood Graham, acting as president and secretary-treasurer, respectively, of the corporation "The Graham & Granger Fruit Company," make sale unto Don Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo, the purchasers, of a fifth interest out of the undivided fifth in the total value of the property "Pueblo Viejo Arriba," described in the preceding first paragraph.

Second. This sale is made in consideration of the sum of seven hundred dollars, which the Graham spouses in the capacity in which they appear acknowledge to have received prior to this act to their entire satisfaction, in accordance with the final decree issued by the District Court of the United States for Porto Rico in the case of Robert Graham *vs.* Rafael Gutierrez del Arroyo, Dolores Gutierrez del Arroyo, and Francisco Robledo, I, the notary, having cautioned the parties in regard to the acknowledgment of the receipt of the purchase price.

Third. Don Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo accept this deed fully.

I made the proper warnings pertinent to this contract. They so state and execute; and, having read the present deed to the contracting parties, they ratify and sign the same together with and in the presence of the witnesses, of full age of this

vicinity, Don Salvador Suau, Don Gabriel Guerra, and H. H. Cloy.

Of all of which, as well as to the profession, vicinity, age, and condition of the contracting parties, and all other matters herein affirmed or recited, I, the notary, give faith, and likewise that with the consent of the parties I have interlined the word "Fruit."—Signed—May Wood Graham. —Robert Graham.—Rafael Gutierrez del Arroyo.—Dolores Gutierrez del Arroyo.—H. H. Cloy. — Gabriel Guerra. — Salvador Suau. — Marked and Signed—Frank Antonsanti.

The foregoing is a true and correct copy of the original of its contents, which, under number 61, appears of record in my protocol for the year 1911. And, for delivery to Mr. N. B. K. Pettingill, I issue the present on one sheet of paper of my private use, typewritten, which I mark and sign in San Juan, Porto Rico, on the 19th of November, 1912.

FRANK ANTONSANTI.

I, Francisco Fano, interpreter and translator of the District Court of the United States for Porto Rico, do hereby certify that the preceding is a correct translation of the original deed in Spanish, No. 61, executed by Mr. Robert Graham and his spouse, Mrs. May Wood Graham, in favor of Don Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo, on August 15, 1912, before the notary public Mr. Frank Antonsanti.

F. FANO,

Interpreter and Translator U. S. Court.

ARGUMENT.

It seems necessary for the purposes of this motion to do no more than refer to the parts of the final decree of which benefit has been taken by the appellants according to the documentary proof contained in the exhibits attached to the motion.

First, as to the sum of $2,174.15 taken from the Registry.

Exhibit 1 shows that this amount was the net proceeds of the price agreed to be paid for tracts numbered 1 and 5. It appears from the final decree that these were two of the tracts described in the final decree (Printed Record, pp. 32, 33) which appellants were thereby ordered to convey, and from the certificate of the clerk of the court below, attached to and a part of Exhibit 1, that said proceeds were accepted by said appellants and withdrawn from the Registry of the court by them through their counsel.

Second, as to the conveyance of the interest of Felicia Fernandez.

It appears from the penultimate paragraph of the final decree (Record, p. 35) that appellee had theretofore acquired an undivided interest in the "entire estate" of which the contract in controversy was a part, and that he was by said decree commanded to execute and deliver to appellants a conveyance of that interest "as to that portion of the entire estate that remains in the possession of"

the appellants; and from Exhibit 2 it appears that appellee has complied with the decree by causing such conveyance to be made to appellants by his assignee, and that said appellants have accepted that conveyance.

The principle has been discussed in numerous decisions of this court, and the case oftenest cited is that of *Embry vs. Palmer,* 107 U. S., 3. While in that case it was held there was no estoppel because of special circumstances, the principle as stated was that estoppel would result where the conduct of appellant after decree was "inconsistent with the claim of a right to reverse the judgment or decree which it is sought to bring into review," which the conduct of appellant in that case was held not to be because "the amount awarded, paid, and accepted constitutes no part of what is in controversy."

Here the contrary is true. The decree of the court below is alleged to be erroneous, and this court is asked to reverse it because appellee *had no right* to a specific performance of his contract with appellant Gutierrez. The decree recognized that right and ordered appellants to convey. The conveyance was made (not by appellants but by the officer of the court under an express provision of the decree, Record, p. 34) and the proceeds deposited in the Registry. Appellants apply for and obtain those proceeds as to two of the tracts conveyed. No separate question was raised or suggested as applicable to those two tracts as distinguished from the remaining ones.

So, as to the conveyance of the interest of Felicia Fernandez. That conveyance was to be made by appellee in part payment of the consideration for the purchase of *all* the tracts. When appellants accepted that conveyance they accepted a benefit applicable generally to all the provisions of the decree, thus placing themselves in a position "inconsistent with the claim of a right to reverse the decree."

Compton *vs.* Jesup, 167 U. S., 1.
Lewis *vs.* Wilson, 151 U. S., 551.
Utermehle *vs.* Norment, 197 U. S., 40.
Winslow *vs.* B. & O. R. Co., 208 U. S., 59.

We respectfully ask that the motion be granted.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellee.

[Endorsed:] No. 129. 22,308. In the Supreme Court of the United States. No. 129. Rafael Gutierrez del Arroyo *et al.*, appellants, *vs.* Robert Graham. Motion to Dismiss.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 129.

RAFAEL GUITERREZ DEL ARROYO
ET AL., APPELLANTS,

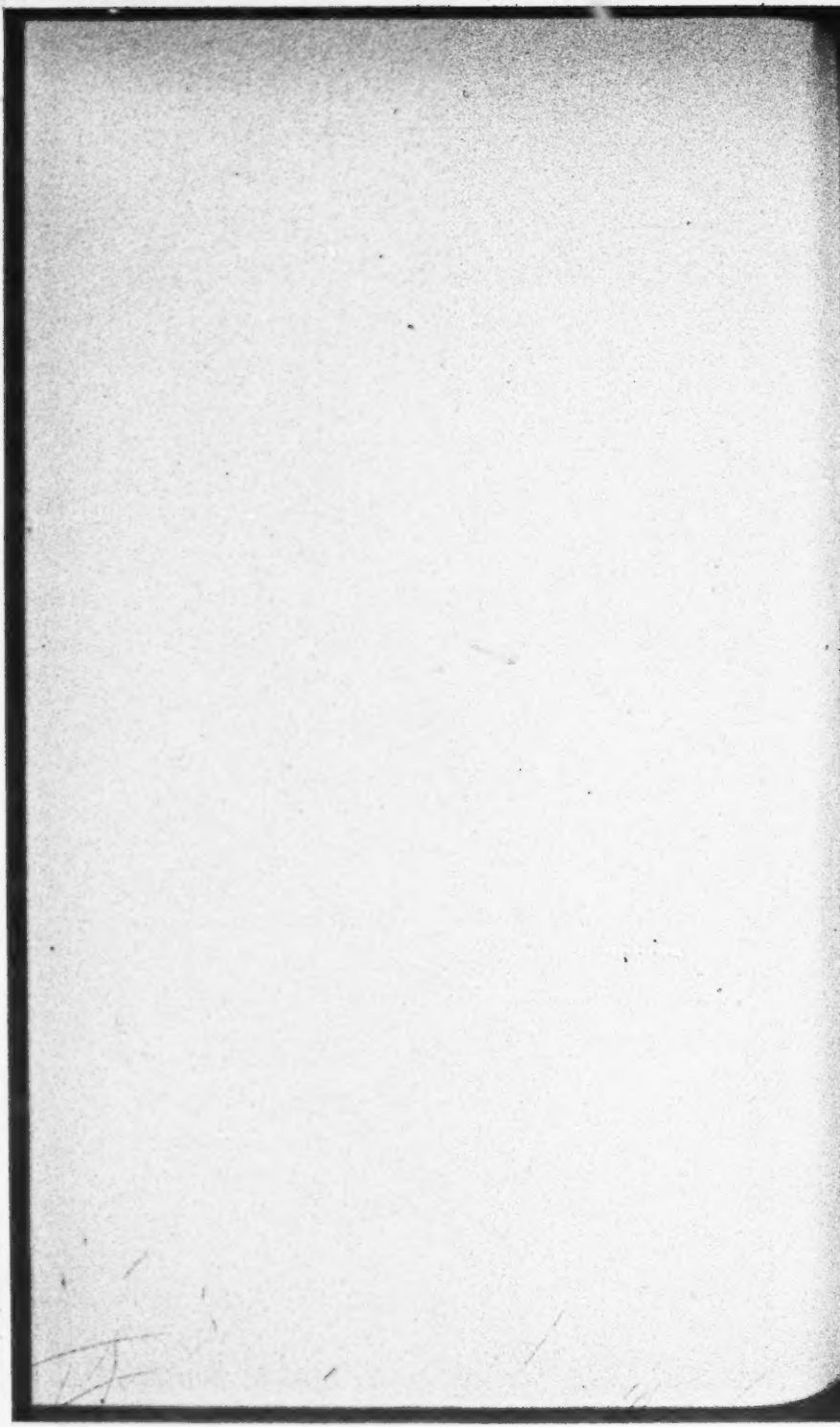
vs.

ROBERT GRAHAM.

BRIEF FOR APPELLEE.

N. B. K. PETTINGILL,
Counsel for Appellee.

(22,308)



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 129.

RAFAEL GUITERREZ DEL ARROYO ET AL., APPELLANTS,

vs.

ROBERT GRAHAM.

BRIEF FOR APPELLEE.

Statement of the Case.

The statement made as the introduction to the brief of counsel for appellants seems somewhat confused because of the admixture of allegations of the bill with extracts from the documentary evidence and quotations from the findings of fact afterwards made by the court below. It will therefore be attempted, at the risk of repetition, to state the case more clearly as well as more succinctly.

The bill of complaint (printed Record, pp. 1-5) was in the ordinary form of a bill for specific performance, alleging the making of a written contract between the complainant and one defendant acting for himself and his sister, another defendant (paragraphs I and II), a subsequent proposal to modify the same, which never became effective for reasons stated (paragraph III), a tender of performance as to two of the tracts of land, which were to be conveyed first and paid for in cash (paragraph IV), and the definite refusal on the part of defendants to make any conveyance whatever, on the ground that the contract was no longer in force (paragraph V), which was followed by a general allegation of some claim of interest in the tracts referred to by a third defendant, and by the usual prayers for relief.

The answer of the two defendant owners of the three parcels of land involved was joint (pp. 7-11), and in it they admitted the making of the contract, but alleged that it had become void on account of the non-fulfilment of its closing conditions (paragraph I); that it was in part rescinded by a clause added to it on April 27, 1908, whereby the contract as to the third or largest tract was transformed into an agreement appointing appellee as an agent for its sale and its original provisions made null and void (paragraph II); that appellee had admitted the rescission of the contract as to said third parcel because he could find no purchaser under his alleged appointment as agent to sell (para-

graph III); that appellee was estopped from enforcing said contract because, since it had been made, appellants had executed a still-existing lease of said third tract to their co-defendant Robledo with the knowledge of appellee (paragraph IV), and because appellee himself had entered into a lease of the two smaller tracts (paragraph V), and that they had rightly refused the tender of appellee in payment of the two smaller tracts because he had insisted that they be made to contain an acreage larger than they actually had (paragraph VI).

The answer of defendant Robledo, who was merely the holder of a lease from the principal defendants of certain land which included the third tract, set up simply the existence and validity of his lease, and that the same was made by him without knowledge of the contract between the other parties (pp. 12-15).

Those pleadings made the issues upon which the case was tried and upon them the court below, after a full consideration of all the evidence and an exhaustive résumé of the same in an opinion (pp. 16-22), entered its decree for the complainant, appellee here (pp. 31-35), and signed and filed certain findings of fact (pp. 22-30), the character of which will be discussed hereafter in the argument, but of which it may here be said that they are either simply evidentiary or are embodied specifically in the decree itself.

ARGUMENT.

Before entering upon the argument of and meeting the contentions of the appellants upon the merits of the controversy, as presented in the brief of their counsel, it is desired respectfully to call the attention of the court to our motion to dismiss their appeal, recently filed herein, on the ground that, since their appeal was taken and perfected, appellants have elected to take the benefits of the decree; whereby, it is now again urged, they should be held estopped from its further prosecution. (See said motion and brief in support thereof now on file.)

It is further respectfully contended that as this appeal was taken while the act of Congress of April 7, 1874, governing such appeals was still in force, the examination and consideration of this court is confined to errors alleged to have been made in the admission or exclusion of evidence and to determining whether the findings of fact support the judgment, in case a proper statement of the facts appears (Crowe *vs.* Trickey, 204 U. S., 228, 234). Where no errors have been alleged as to the admission or exclusion of evidence, as here, and where no proper statement of facts is contained in the record, as we contend is also the case here, there is nothing for this court to re-examine, and the decree below must for that reason be affirmed (Gray *vs.* Howe, 108 U. S., 12; Salina

Stock Co. *vs.* Salina Creek Co., 163 U. S., 118; Thompson *vs.* Ferry, 180 U. S., 484). It has further been repeatedly held that the facts properly to appear from said statement must be the ultimate, not the evidentiary, facts (U. S. Trust Co. *vs.* New Mex., 183 U. S., 535; Crowe *vs.* Trickey, *supra*).

In the light of these and other precedents it is submitted that the contents of all the findings of fact (pp. 22-30) are simply evidentiary, with the exception of the last three lines of the IVth (p. 28), the VIth (p. 29), and the VIIth (p. 30). But the substance of these three findings, to wit, that the lease to Landrau had expired before the specific performance was ordered, that the new lease to Robledo, made after the expiration of the Landrau lease, was made with full notice of the contract of sale, and that the appellee had complied with his obligation to obtain her undivided interest in the property from a co-owner, Felicia Fernandez, so as to be able to convey the same to appellants in that part of the property not to be purchased by him, are not only consistent with but are the very foundation and support of the decree for appellee. Hence, if the remaining findings do not contain such ultimate facts as this court may consider, there is nothing more for it to re-examine, according to the authorities above cited, and the appeal should be dismissed or the decree below affirmed for that reason.

But, even should the court conclude, in the language of Chief Justice Fuller in the *Crowe case*, that "a sufficient statement finally emerges," very few points are open to contention on the part of appellants. It may, we suppose, be presumed that as counsel for appellants depend upon and urge only those alleged errors specified in his argument, the court will not pause to examine those assigned in the record (p. 36) and now abandoned; yet out of an abundance of caution they may be reviewed in a word:

The premise upon which the first is based is not supported by the record.

The second is dependent upon the facts proven, and no reference thereto is made in the findings of fact.

The third is preserved in the argument now made by counsel for appellants, and will be considered in the argument hereafter to be made.

The fourth is directly negatived by the concluding lines of the fourth finding of fact.

The fifth was not raised by the pleadings; and

The sixth, seventh, and eighth are too general to be considered by this court.

Apparently appreciating this situation, counsel for appellants, after reciting in his brief the assignment of errors as thus stated in the record, restates the contentions he desires to make in four paragraphs (Brief, p. 10), and then condenses them still further (p. 11) by declaring that

> "Simply stated, the contention of the brief and argument of appellants rests upon the proposition that the court below, by its decree, failed to appreciate the true character of the agreement between the parties, as they were and must be determined in the light of the civil law which prevails in Porto Rico."

Whereupon he states three contentions in support of this proposition which will now be considered in their order.

I.

The contention made on behalf of appellants under this first head is that the contract under consideration was "but an option to purchase" (*promesa de venta*).

The first difficulty which suggests itself in supporting this contention is that it must be an afterthought, or at least an original thought of counsel who has now succeeded in this court to the representation of the appellants, because it is expressly negatived by the language of their answer to the bill. In the last sentence of the first paragraph of that answer (p. 8) it is said:

> "They therefore aver that the said *contract of sale* copied above between these defendants and the complainant remains null and void on account of the non-fulfilment of the said conditions."

And in the very first sentence of the paragraph following (II), on the same page of the record, they say:

> "These defendants further show to this honorable court that the said *contract of sale* between these defendants and the complainant has not been ratified," etc.

As also the first sentence in the same paragraph after the quotation of the "modification" of April 27, 1908 (p. 9):

> "These defendants aver that as to that part of the *agreement of sale* which refers to the 200 or 300 cuerdas mentioned in the 3rd clause of said contract," etc.

Indeed, from beginning to end of said answer there is no intimation of a claim that the contract in question was an "option to purchase" rather than an "absolute contract of sale," or that giving it the one nature or the other would have changed the obligations of the parties thereunder in any respect. And in this regard it is submitted that the views of former counsel were correct, and that pesent counsel puts forward no sound or convincing argument to sustain the distinction attempted to be drawn *in so far as the rights of these parties are affected.*

Title II of the Revised Civil Code of Porto Rico (1902) is headed "Contracts," and chapter 1 thereunder is headed "General Provisions," and of this chapter one of the sections is as follows:

> "SECTION 1225. Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfilment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law."

Under the same title, at the beginning of chapter III, which deals with "Effectiveness of Contracts," occurs:

> "SECTION 1245. Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist.
>
> "SECTION 1246. Should the law require the execution of an instrument or other special formality in order to make the obligation of a contract binding, the contracting parties may *compel each other to comply with said formalities* from the moment in which consent and the other requirements necessary for their validity have taken place."

And that was exactly the object of the bill of complaint which resulted in the decree now complained of. The above statute suggests no distinction between different forms of contract, nor any

limitation in the exaction of performance of one kind more than another. It says that contracts are binding, *whatever their form,* and that, if some requirement of law as to their form is lacking to make them binding, the parties *may mutually compel compliance* with that requirement. So, here, defendants had agreed to sell certain land to the complainant at a certain price. Whether that agreement was technically in the form of an "option to purchase" or of an "absolute contract of sale" is immaterial. Whichever it was, defendants had refused to comply with their agreement by executing the actual deed of transfer. And complainant therefore applied to the court to "compel (defendants) to comply with said formality." As defendants made no claim in their defense that complainant had been at any time notified that his "option," if such it were, was withdrawn and their obligation ended, it is believed that the suit was well brought, whatever may be considered the technical legal effect of the contract as to its form.

The next contention for appellants, made evidently to overcome the want of any affirmative withdrawal of what they claim was an option, is that this "option agreement" "contained as an essential part of the transaction * * * a definition and limitation of the *time* in which the option was to be exercised by Graham," and it is insisted that this limitation was *two years from its date*. Counsel does not explain clearly upon what he bases this contention, nor has a careful study of the record discovered such a provision.

The only reference to a term of two years, or, indeed, to any period of time, is in the sentence within the subdivision numbered "4th," reading:

> "4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the 3rd number shall be paid in instalments during the two years following the delivery of the document."

Counsel says that the cash for parcels indicated in Nos. 1 and 2 was to be paid "immediately," and that the mortgage instalments on the parcel indicated in No. 3 were to be instituted as payable in one and two years from the date of the *contract*. But that *cannot* be the meaning, because the quoted sentence itself says that the two years intended were those "following the delivery of the document." What document? Clearly, either the final deed of conveyance, or the public document provided for in the 5th subdivision of the contract. But whether the one or the other, the contention of appellants receives no support, for, evidently, the "public document" was to be the forerunner of the real conveyance, yet the former was not to be prepared until "Graham will have ultimated the deal which is now pending with Doña F. F. about the purchase of an undivided part in the same estate." In fact, the provision following the one quoted makes it plain that this informal contract was to remain in full force, but no step to make it more formal was to be taken *until* the result of the negotiations between Graham and

Doña F. F. should be ascertained, and for the completion of *those* negotiations no limit of time was set. How, therefore, can it reasonably be contended that anything in the contract was limited to two years *from its date?*

With that premise overthrown, the whole structure of the argument of counsel for appellants collapses, because it is stressed upon that *fixed period* being the "determinate cause" upon the lapse of which "the option, by force of its terms and by operation of law, expired" (Brief for Appellants, p. 13). There being concededly no express notice of an intention to terminate the option, if the court also finds that it did not expire at a particular date fixed "by force of its terms and by operation of law," then the insistence that the contract was an option rather than an absolute agreement to sell becomes valueless, because the same legal consequences follow whether it be the one or the other.

II.

Point two, made by appellants, is based upon a claim that the original contract was on April 27, 1908, changed into one of agency to sell, revocable at the pleasure of appellants.

One difficulty with this contention is that it, like one of the contentions made under the first point, is inconsistent, both with the reading of the "modification" referred to, that of April 27, 1908, and with the allegation of the answer of these appel-

lants filed in the court below. Paragraph II of that answer (p. 9) distinctly alleges that on said date "said contract was *in part* rescinded by a writing, which translated into the English language literally is as follows," and then follows the translation, which is identical with that contained in the findings of fact (p. 23, II) and which reads as follows:

> "On the 27th day of April, 1908, the contracting parties *make addition to* the 3rd clause of *this contract* in the sense that the excess of price," etc.

The only construction consistent with the plain meaning of the quoted words is that, instead of any part of the then existing contract being rescinded, the third clause (which was the one referring to the largest tract) was *added to* by giving to the appellee, in addition to his existing right to purchase for himself, the right to require appellants to convey to any third party named by him, with an obligation on the part of appellee to divide equally with appellants whatever surplus of price such third party should pay over and above the $55 per cuerda named in the original contract.

It is to be borne in mind further that this supplementary writing, whatever it may be called, affected only the third subdivision of the original contract, and that from the words "this contract" it should be inferred that the writing existed upon the same paper, or a paper attached to the original

contract. This is further confirmed by the letter from appellant Guiterrez to the appellee of even date with the supplementary writing (p. 29), which refers to the authority that day conferred to sell the large tract to a third person as given "in accordance with conditions agreed," which conditions must have been those stated in the original contract of July 5, 1906.

Likewise the same contention made under point one is here also important, that there is neither allegation in the answer nor finding of fact by the court indicating that this authority conferred on appellee, whether as agent to sell or as holder of the option to buy, was withdrawn before notice given by appellee of his desire to exercise it. Counsel for appellants avers in his brief (p. 18) that:

> "It does not appear from the findings of the court below that appellee Graham exercised this agency or power of sale as it was contained in and governed by the agreement of April 27, 1908, or that any obligations were assumed by him thereby."

But it does appear from the final decree that the court below expressly held (p. 31) that:

> "All of the conditions of said contract having been complied with by the complainant, the said Robert Graham, and a specific performance being prayed, the court having duly *considered all of the evidence* in said cause, * * * it is hereby ordered, adjudged, and decreed that the said contract entered into on the fifth day of July,

1906, is *in full force and effect as executed,* and that the same be executed by the parties thereto specifically as agreed," etc.

The court below having therefore found from all the evidence that the original contract was in full force and effect, and there being nothing in the findings of fact inconsistent with that conclusion, its correctness cannot be disputed by the appellants on this record.

Counsel cites as applicable to the point now being discussed a decision of the Supreme Court of Spain stated to hold that an option contract can be modified by mutual consent like other contracts, etc. But that declaration of the law need not be controverted here, because the question at issue is, not whether such a contract *can* or not be modified, but whether the parties *did in fact act* upon the original contract or upon the modification. The court below, as seen from the foregoing quotation from the final decree, decided that appellants were bound by the "contract entered into on the fifth day of July, 1906," and decreed that *that* contract be specifically enforced. So the question of *power* to modify is not involved.

It is submitted, therefore, that there is no foundation in the record for appellants' contention, as stated in their point, that "the modification of April 27, 1908, converted the option to purchase into an agency," since it modified only in the sense of adding to it, and that, in any event, such a contention is not open to the appellants. Moreover,

the argument of counsel, instead of showing any conversion, is directed rather toward proving what results might legally have followed had such a conversion in fact taken place. Failing support of the premise, it is unnecessary to consider the correctness of the conclusion.

III.

In answer to the third point made on behalf of appellants it should suffice to say that any "incontestable admission" on the part of appellee was avoided purposely by the insertion of the *sixth* clause in said lease of August 10, 1909 (p. 25), which clause reads as follows:

> "Inasmuch as each of the contracting parties allege certain rights which are contradicted by the other, emanating from previous transactions, which might affect this lease, the parties hereto agree that this contract does not make better or worse, nor modify the value, scope and existence of such rights."

In noting the imperfections of the English used in the above, it must be borne in mind that it is a translation from Spanish, but its meaning is sufficiently evident. And by this express reservation, that nothing in that lease should change or prejudice whatever rights either party might have or claim in pending controversies, the force of the third contention of appellants is entirely destroyed.

IV.

In conclusion, it may be proper to suggest that it must be apparent from the record that these contracts were made and this correspondence carried on to a large extent directly between the parties themselves, without the intervention of lawyers; that the informal structure and language used not only tended to some uncertainty in meaning, but that uncertainty was naturally increased by the fact that the principals were little acquainted with each other's tongue; that, therefore, the slight inconsistencies or ambiguities in words used should be liberally harmonized to give effect to what was evidently the real intent of the parties at the time, and that, to an even greater extent than in ordinary cases, should this court be reluctant to interfere with the conclusions arrived at by the judge below, who heard the parties and witnesses testify and had the evidence in all its detail before him.

We respectfully urge that the decree of the lower court should be affirmed.

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